

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8184
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUADALUPE VILLEGAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-89-CR-334)

(September 30, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Guadalupe Villegas appeals his conviction for violation of 18 U.S.C. § 922(g)(1), felon in possession of a firearm, asserting on appeal, as he did in the district court, a

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of his right to a speedy trial pursuant to the Sixth Amendment of the United States Constitution. Finding no reversible error on the part of the district court, we affirm.

I

FACTS AND PROCEEDINGS

Villegas was indicted in 1989 and convicted in 1992, following a bench trial, of being a felon in possession of a firearm. The indictment was issued in December of 1989, following Villegas's arrest in March of 1989 by officers of the San Antonio police department for unlawfully carrying a weapon. The State declined to prosecute the case and Villegas was released. Special Agent Marshall Littleton of the Bureau of Alcohol, Tobacco and Firearms (ATF) was not able to locate Villegas. He was not arrested on the federal charge until September 1992, and then only as a result of his having called the police to report a disturbance and having been arrested for public intoxication.

Villegas filed a motion to dismiss the indictment for a constitutional speedy-trial violation, which motion was denied orally. The district court did grant Villegas leave to renew the motion if he could make an additional showing that the delay between the 1989 indictment and the 1992 arrest prejudiced his defense. The case was then referred to another judge of the district court who, after hearing testimony, denied Villegas's motion to dismiss, conducted the bench trial, and found him guilty as charged in the indictment. Villegas was sentenced to serve eighteen months in prison, to be followed by three years of

supervised release and a \$50 special assessment. He timely appealed.

II

ANALYSIS

Villegas argues that the district court erred by denying his motion to dismiss the indictment grounded on failure of the government to bring him to trial in a timely manner. He contends that the delay between his indictment and his arrest resulted from the government's negligence, and that the delay deprived him of an adequate opportunity to locate witnesses and to present a defense.

In Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court provided the following four-pronged balancing test for examining constitutional speedy-trial claims: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The four Barker factors are not rigid requirements, and a constitutional deprivation may be found without "mechanical factor-counting." Nelson v. Hargett, 989 F.2d 847, 851 (5th Cir. 1993) (§ 2254 case); see Barker, 407 U.S. at 533.

"Until there is some delay which is presumptively prejudicial, there is no necessity to go into the balance." Davis v. Puckett, 857 F.2d 1035, 1040 (5th Cir. 1988) (internal quotation and citation omitted). As noted, Villegas was indicted in December of 1989, but was not arrested on the federal firearms charge until September of 1992. As this delay of almost three years falls

within the range considered presumptively prejudicial, an inquiry into the other Barker factors is required. See Davis, 857 F.2d at 1040 (5th Cir. 1988) (delay of 13 months warrants inquiry into other Barker factors); Millard v. Lynaugh, 810 F.2d 1403, 1406 & n.1 (5th Cir.), cert. denied, 484 U.S. 838 (1987) (collecting cases showing range of delay considered presumptively prejudicial). The length of the delay in the instant case, however, does not weigh heavily in Villegas's favor. See United States v. Loud Hawk, 474 U.S. 302, 314, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) (a delay of 90 months did not result in a violation of federal constitutional speedy trial rights).

The district court found that Villegas had asserted his speedy trial rights in a timely fashion. Both district court judges who considered Villegas's motion also concluded, however, that the delay was not due to any government negligence, and that Villegas's defense had not been prejudiced by the delay. On appeal, Villegas challenges both of these findings.

The district court's conclusions regarding negligence are reviewed on appeal "with considerable deference." Doggett v. United States, ____ U.S. ____, 112 S.Ct. 2686, 2691, 120 L.Ed.2d 520 (1992) (citations omitted). Villegas contends that the government's efforts to locate him were "minimal," and "desultory," and that its use of an incorrect Social Security number in searching for him was "likely the result of a Government recordation error." Villegas points out that the officers did not try to find him through public housing authorities or through

persons in the neighborhood where he was arrested on state charges.

Testimony from ATF Agent Littleton established that he attempted to locate Villegas by going to the address where Villegas was originally arrested. He also contacted local police officers in San Antonio and discussed the case with them. And Littleton searched for Villegas via national and state criminal data bases, Department of Public Safety driver's license records, telephone records, and unemployment records. Littleton regularly repeated these efforts, including maintaining an ongoing dialogue with San Antonio police officers.

In United States v. Garcia, 995 F.2d 556, 560 (5th Cir. 1993), we determined that the delay was not caused by the government's lack of diligence. There, as here, federal law enforcement officers had attempted to find the defendant by contacting and maintaining a dialogue with local police officers. We noted that, as with the instant case, there was very little delay between the time the defendant was arrested and the time he was tried. Id. Therefore, in light of our decision in Garcia, and the deference accorded to the district court's conclusion that there was no negligence on behalf of the government, Villegas's contention that the government was negligent fails.

Villegas also challenges the district court's determination that his defense was not prejudiced by the delay between indictment and arrest. The Supreme Court has identified several forms of possible prejudice resulting from a delay between formal accusation and trial: "`oppressive pretrial incarceration,' `anxiety and

concern of the accused,' and `the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett, 112 S.Ct. at 2692 (quoting Barker, 407 U.S. at 532). Villegas, however, cannot claim that he was prejudiced by either oppressive pretrial incarceration or anxiety, as he was not incarcerated prior to his trial and was unaware of the sealed federal indictment. That leaves impairment of defense as his only possibility.

Villegas does argue that his attempts to locate witnesses to the March 1989 arrest were hampered by the delay, and that this prejudiced his defense. Villegas was able to identify Juanita Reynosa as one such witness but her testimony, to which both parties stipulated, was not clearly exculpatory and did not suffer due to the delay. Another such witness, Cruz Avitia, was Villegas's girlfriend at the time of his arrest in 1989. Villegas testified that he was at her apartment and was just going outside to get some cigarettes when he was arrested. She was present in the courtroom during one of the hearings on Villegas's motions. The hearing occurred one day before the district court found Villegas guilty. Villegas argues that Avitia was "[at] no time. . . mentioned as a witness," yet he has not shown that the delay prejudiced his ability to secure her as a witness. He does not argue that there were any other potential witnesses who were lost due to the delay. Finally, the fact that the government did not deliberately delay in order to hamper Villegas's defense "militates against a finding of prejudice." Garcia, 995 F.2d at

561.

Villegas argues that the district court used incorrect "prejudice" standards by focusing on whether he had shown that witnesses were unavailable. He contends that this burden runs contrary to the presumptive prejudice arising from the delay, "which was `neither extenuated, as by the defendant's acquiescence,' nor `persuasively rebutted'" by the prosecution (quoting Doggett, 112 S.Ct. at 2694) (footnote omitted). Villegas also points out that the district court weighed the strength of the government's case against a finding of prejudice; he contends that this factor shows "all the more need to preserve evidence and identify witnesses and the years that were lost to him made that difficult, if not impossible."

Even if the district court had failed to apply the correct standard to measure prejudice, we are not prohibited from applying it. See Doggett, 112 S.Ct. at 2692-94. Given the presumption of prejudice, that factor may weigh slightly in Villegas's favor. But especially in light of the relatively short delay, the lack of negligence or deliberateness in the government's delay, and the absence of "particularized trial prejudice," Villegas has not shown that the district court's result should be disturbed as it is to great deference should be disturbed. See id. at 2694.

AFFIRMED.